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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-009811 10/08/2015

HONORABLE KAREN A. MULLINS

CLERK OF THE COURT
M. Scott
Deputy

RACHEL A TURLEY, et al. SEAN K MCELENNEY

v.

LEO R BEUS, et al. DAVID B ROSENBAUM

MARTIN A ARONSON
DANIEL G DOWD
JAMES E HOLLAND JR.
MICHAEL C MANNING
ROBERT J MILLER
SARA KATHRYN REGAN
JAY A ZWEIG

MINUTE ENTRY

The Court has considered Plaintiffs' Motion for Partial Summary Judgment (Counts 13-16), Plaintiff's Separate Statement of Facts in Support of Motion for Partial Summary Judgment (Counts 13-16), Defendant Wilford R. Cardon's Response to Plaintiffs' Motion for Partial Summary Judgment (Counts 13-16), Defendant Wilford R. Cardon's Controverting Facts and Separate Statement of Facts, Response of Defendants Beus and Nelson to Plaintiffs' Motion for Partial Summary Judgment (Counts 13-16), Controverting Facts and Separate Statement of Facts of Defendants Beus and Nelson, Plaintiffs' Combined Reply in Support of Motion for Partial Summary Judgment (Counts 13-16), Plaintiffs' Response to Defendant Wil Cardon's Separate Statement of Facts, and the oral argument of counsel.

This Court previously granted summary judgment in favor of Plaintiffs on Count 13 and Count 15 solely as to the removal of Defendant Leo R. Beus as Special Trustee of the 1995 Trust and the removal of Defendant Wil R. Cardon as Trustee of the 1997 Trust, respectively. This Minute Entry Order addresses the following remaining Counts addressed by Plaintiffs' Motion:

1. Count 14, wherein Plaintiffs request that Leo R. Beus be removed as Power Holder of the 1997 Irrevocable Trust due to an alleged breaches of fiduciary duty and conflicts of interest;

2. Count 15, wherein Plaintiffs request a declaratory judgment that the removal of Wil R. Cardon as Manager of Boa Sorte, LLC was lawful, valid, and effective; and

3. Count 16, wherein Plaintiffs seek removal of Wil R. Cardon as Trustee of The 2003 Family Trust due to alleged breaches of fiduciary duty, conflicts of interest, and lack of fitness.

Count 14: Removal of Defendant Beus as Power Holder of the 1997 Trust

In the Verified Complaint, Plaintiffs seek removal of Defendant Leo R. Beus as Power Holder of the Wilford A. and Phyllis R. Cardon Irrevocable Life Insurance Trust dated October 3, 1997 ("1997 Trust") due to material breaches of trust pursuant to A.R.S. §14-11001. *Verified Complaint*, ¶¶380-391. While the Complaint alleges a litany of wrongdoing, the only facts set forth by Plaintiffs in their supporting Statement of Facts to support removal are that (1) Defendant Beus has disclaimed his fiduciary obligations under the 1997 Trust through legal arguments make in this case, and (2) Defendant Beus participation as a Board member pursuant to the Management Agreement constitutes a breach of his fiduciary duties. *See Plaintiffs' Motion for Partial Summary Judgment (Counts 13-16)*, 2:1-22, 13:21-14:5.

The following facts are undisputed by the parties: Defendant Leo R. Beus ("Defendant Beus") is the Power Holder of the 1997 Trust, pursuant to an Appointment of Successor Power Holder, dated August 15, 2011, and as such has the power to "distribute a portion or all of the principal and accumulated income of the Trust to or for the benefit of any one or more of the Beneficiaries…" *Plaintiff's Separate Statement of Facts in Support of Motion for Partial Summary Judgment* ("*PSOF*"), ¶¶57, 58, Exh. 1, §2.3, Exh. 25; *Defendant Wilford R. Cardon's Controverting Facts and Separate Statement of Facts* ("*DSOF*")[1], ¶¶57, 58; *Controverting Facts and Separate Statement of Facts of Defendants Beus and Nelson, Plaintiffs' Combined Reply in Support of Motion for Partial Summary Judgment (Counts 13-16)* ("*Beus SOF*"), ¶1. Plaintiffs in this case are beneficiaries of the 1997 Trust. *PSOF*, ¶¶1, 4; *DSOF*, ¶¶1, 4; *Beus SOF*, ¶1. The 1997 Trust holds a 15.81278% interest in Boa Sorte LP. *PSOF*, ¶34; *DSOF*, ¶34; *Beus SOF*, ¶1. Defendant Beus voted, as one of five Board members designated by the Management

[1] "DSOF" refers to that portion of Defendant Wilford R. Cardon's Controverting Facts and Separate Statement of Facts that correspond to the same paragraphs as those set forth in Plaintiff's Separate Statement of Facts in Support of Motion for Partial Summary Judgment, while "DSSOF" refers to that portion of Defendant Wilford R. Cardon's Controverting Facts and Separate Statement of Facts that sets forth new separately stated facts.

Agreement[2], on certain transactions that allegedly inured to the benefit of Defendant Wil Cardon. *PSOF*, ¶60; *DSOF*, ¶60; *Beus SOF*, ¶1. Those transactions included action on a $1.1 million home which Defendant Wil Cardon claims is an asset of Boa Sorte LP and action on $2.699 million paid to Defendant Wil Cardon from Boa Sorte LP which Defendant Wil Cardon claims was payment on his 35% share of liquidated or apportioned assets as called for in the Management Agreement. *PSOF*, ¶¶54, 60; *DSOF*, ¶¶54, 60; *DSSOF*, ¶59; *Beus SOF*, ¶1. Defendant Beus has joined in arguments in this litigation that neither he nor the Board, under the Management Agreement, have a fiduciary duty to the trust beneficiaries, and that as an Arbiter under the Management Agreement, he is immune from liability. *PSOF*, ¶59; *DSOF*, ¶59; *Beus SOF*, ¶1.

Plaintiffs rely on A.R.S. §14-10808(D) to establish that Defendant Beus owes a fiduciary duty to Plaintiffs:

> Unless the trust instrument provides otherwise, a person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

A.R.S. §14-11001(A) provides, "A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust." One of the remedies available to this Court is removal of the trustee under A.R.S. §14-10706. *A.R.S. §14-11001(B)(7).* A.R.S. §14-10706 allows removal for material breaches of trust. The Court concludes that Defendant Beus' appointment as Power Holder is substantively equivalent to a trustee and that he is subject to removal for a material breach of trust under these statutes.

The issue before the Court is thus whether the undisputed material facts support a finding as a matter of law that Defendant Beus committed a material breach of his fiduciary duties as the Power Trustee of the 1997 Trust by approving the transactions in question when acting in the capacity of a Board member under the Management Agreement.

A fiduciary cannot abdicate his responsibilities by delegating them entirely to another person. *Restatement (Second) of Trusts § 171*, cmt c ("The trustee cannot properly commit the entire administration of the trust to an agent or co-trust or other person, unless he is permitted to do so by the terms of the trust."); see also *Shriners Hospitals for Crippled Children v. Gardiner*, 152 Ariz. 527, 528, 733 P.2d 1110, 1111 (1987)(citing to the foregoing Restatement section).

[2] When the Court employs the term "Management Agreement" in this Minute Entry Order, it means the document attached as Exhibit 24 to PSOF and Exhibit G to DSOF.

Here, Defendant Beus delegated his responsibilities as Power Holder by allowing transfers of assets of the 1997 Trust to be approved by a majority vote of five persons, four of whom had no fiduciary duties concerning the 1997 Trust. In other words, Defendant Beus essentially abdicated his fiduciary duties owed to Plaintiffs, as beneficiaries of the 1997 Trust, and stood by while and additional four persons, who owed no duties to Plaintiffs, affected Plaintiffs' interests. This delegation of authority is a material breach of trust.

In defense, Defendants argue that Plaintiffs ratified the terms of the Management Agreement and the actions of the Board members (including Defendant Beus) by approving the transactions in question. *PSOF*, ¶54, disputed in *DSOF*, ¶54; *DSSOF*, ¶¶39, 42-45, 47-49; *Beus SOF*, ¶1. Additionally, Defendants attempt to justify the substance of the transactions in question by arguing that they were either reimbursement of expenses previously paid by Defendant Wil Cardon, compensation for Defendant Wil Cardon's services as trustee of the 1997 Trust prior to his removal, or concerned assets of Boa Sorte LP rather than Defendant Wil Cardon personally. *See e.g.*, *DSSOF*, ¶¶3, 4, 22-24, 32-34, 42-45, 59. The Declaration of [Defendant] Leo Beus sets forth opposing testimony regarding many of the disputed facts noted above, *e.g*., the agreement, ratification, and participation of Plaintiffs in the creation of the Board and the circumstances of the Board actions. *See DSSOF*, Exh. D, ¶¶20-22, 26, 55-56, 63-67, 70, 72-92, 102-104, 110, 116-117, 119-125, 127, 131, 133-134, 140-142.[3]

A.R.S. §14-11009 provides that a trustee is not liable to a beneficiary for breach of trust if the beneficiary ratified the transaction constituting the breach. Thus, while the foregoing opposing facts presented by Defendants may be material to the liability of Defendant Beus to Plaintiffs, these opposing facts are immaterial to the issue of whether there was in fact a material breach of trust by Defendant Beus when he delegated his authority to the Board under the Management Agreement, thereby triggering the remedy of removal of the trustee under A.R.S. §14-10706. Because removal is the remedy sought by Plaintiffs in Count 14, rather than liability, Plaintiffs are entitled to summary judgment on Count 14 in the form of an order removing Defendant Beus as Power Holder of the 1997 Trust.

[3] Some comment is required in regard to these opposing facts. The Court agrees with Plaintiffs' analysis of these facts at pages 11-12 of their Combined Reply in Support of Motion for Partial Summary Judgment (Counts 13-16) that an analysis of the underlying facts cited by Defendants in its Controverting and Separate Statement of Facts reveals at most that Plaintiffs knew about the Board and wanted the Board to stop Wil from certain personal conduct. Even if these facts were deemed material, they do not support a prima facie case of ratification and therefore do not create an issue of material fact for purposes of Plaintiffs' Motion.

Count 15 Declaration that Defendant Wil Cardon was Lawfully Removed as Manager of Boa Sorte LLC

In the remaining unresolved allegation of Count 15 of the Verified Complaint, Plaintiffs seek a declaratory judgment that the removal of Defendant Wil Cardon as manager of Boa Sorte, LLC was lawful, valid, and effective.

It is undisputed that Boa Sorte LLC is governed by an Operating Agreement that allows a manager to be removed at any time by a majority of its members holding units entitled to vote. *PSOF*, ¶¶12-14, Exh. 11; *DSOF*, ¶¶12-14. It is further undisputed that six Plaintiffs held a majority of units. *PSOF*, ¶23; *DSOF*, ¶23. On June 10, 2014, the same six Plaintiffs voted, in writing, to remove Defendant Wil Cardon as Manager of Boa Sorte LLC. *PSOF*, ¶¶26, 27; *DSOF*, ¶¶26, 27.

Nowhere in Defendants' opposing facts, or in their response to Plaintiffs' Statement of Facts, do Defendants set forth any facts that dispute the rights of the Plaintiffs to vote, the majority status of their vote, and the applicable provisions of the Boa Sorte LLC Operating Agreement that authorizes removal of the manager by such majority vote. Indeed, the only argument made in opposition to the foregoing by Defendants is their contention that, under the Management Agreement, the Board had the sole power to take any and all actions concerning Boa Sorte LLC. *DSSOF*, ¶¶53, 54. This argument fails for several reasons.

First, the Management Agreement does not give the Board the right to vote on the question of who is the designed manager of any particular entity. Rather, the two cited provisions of the written Management Agreement define "Cardon Assets" and provide that the "Board of Directors shall have the sole and unfettered authority and discretion to make, take and provide any and all determinations, decisions, consents, approvals, actions or similar regarding the business and affairs of…all Cardon Assets. *DSSOF*, Exh. G, at Section 1.a(a). "Cardon Assets" are defined as "assets, properties or investments". *Id*., Exh. G, at Section 1.2. Thus even assuming the Management Agreement was valid as to Plaintiffs, addressed momentarily, the very terms of that Agreement are limited to actions related to <u>assets, properties or investments</u> and not to the selection of managers or to the right to vote on behalf of a particular legal entity.

Second, Defendants have presented no evidence that Plaintiffs are a party to the written Management Agreement. In fact, the opposite is true. The Management Agreement identifies the "Parties" to the Agreement as Boa Sorte LP, Rio Claro, Inc., and Harvard Capital Limited Partnership. *DSSOF*, Exh. G, at p. 1. Boa Sorte LLC is also not a party to the Agreement. Moreover, none the Plaintiffs, with the exception of Patrick R. Cardon, signed the written Management Agreement, and his signature alone does not bind Plaintiffs in regard to the issue at hand. *Id*., Exh. G, at pp. 14-20. Lastly, the Agreement states that "with the signatures of the five

initial Directors of the Board, this Agreement shall be binding on all signatories hereto", yet only two of the named five Board members signed; thus there is no evidence the Management Agreement became binding. *Id*., p. 14.

Third, a defense of ratification makes no sense in the context of the removal of Defendant Wil Cardon as Manager of Boa Sorte LLC because there was no action taken by the Board that Plaintiffs could have ratified. And because the scope of the written Management Agreement, even if it had become binding, does not include voting rights of Boa Sorte LLC, that Agreement is wholly immaterial to Count 15.

In summary, Defendants have not set forth any facts that oppose the material facts set forth by Plaintiffs establishing the written majority vote to remove Defendant Wil Cardon as Manager of Boa Sorte LLC, nor have Defendants set forth any legal argument that renders that vote ineffective. Therefore, Plaintiffs are entitled to summary judgment on the remaining allegation in Count 15, *i.e.* a declaration that the removal of Wil R. Cardon as Manager of Boa Sorte LLC was lawful.

Count 16 Removal of Wil R. Cardon as Trustee of the 2003 Family Trust

In Count 16 of the Verified Complaint, Plaintiffs seek removal of Defendant Wil Cardon as Trustee of the 2003 Family Trust due to alleged breaches of fiduciary duty, conflicts of interest, and lack of fitness. Plaintiffs allege that Defendant Wil Cardon is self-dealing by pursuing the alleged 1998 promise made to him by his father, that the formation of the Board to act is an unlawful delegation of his fiduciary duty, and that the actions taken by the Board constitute breaches of his fiduciary duties. Because the unlawful delegation of his fiduciary duty is dispositive, the other allegations are not considered.

In response, Defendant Wil Cardon represents that he does not claim the 2003 Family Trust is governed by the Board acting under the purported authority of the Management Agreement, yet he asserts that "the Board has control over the companies in which the trusts hold an indirect interest, so the Board selects company management." *Defendant Wil Cardon's Response to Plaintiffs Motion for Partial Summary Judgment (Counts 13-16)*, at p. 1, fnt. 2. Yet the only opposing facts set forth by Defendants in support of this argument, are the two provisions of the written Management Agreement previously addressed, *i.e*. the provision that defines "Cardon Assets" as "assets, properties or investments" and the provision that states the "Board of Directors shall have the sole and unfettered authority and discretion to make, take and provide any and all determinations, decisions, consents, approvals, actions or similar regarding the business and affairs of…all Cardon Assets. *DSSOF*, ¶¶53, 54, Section 1.a(a), Section 1.2. Thus, the Management Agreement only purports to allow the Board to take action in regard to the assets of Boa Sorte LP. *See id*. It is undisputed that Plaintiffs are Trustors of the 2003 Family

Trust. (*PSOF*, ¶¶4, 36, 42; *DSOF*, ¶¶4, 36, 42). The 2003 Family Trust holds a 50.327320% interest in Boa Sorte LP. *PSOF*, ¶38; *DSOF*, ¶38. It is further undisputed that the Board established by the Management Agreement approved of at least two transactions concerning assets held by Boa Sorte LP. *PSOF*, ¶54; *DSOF*, ¶54; *DSSOF*, ¶59.

The Court held in regard to Count 14 that, as a matter of law, a fiduciary cannot abdicate his responsibilities by delegating them entirely to another person. *Restatement (Second) of Trusts § 171*, cmt c; *Shriners Hospitals for Crippled Children v. Gardiner*, 152 Ariz. 527, 528, 733 P.2d 1110, 1111 (1987). Here, Defendant Wil Cardon allowed transactions to be approved by a majority vote of five persons, four of whom were not named as Trustees of the 2003 Family Trust. For the reasons stated in regard to Count 14, this delegation of authority is a material breach of trust, thereby triggering the remedy of removal under A.R.S. §14-10706.

Moreover, as was true regarding Count 14, the opposing facts presented by Defendants may be material to the liability of Defendant Wil Cardon to Plaintiffs, but not to the issue of whether there was in fact a material breach of trust by Defendant Wil Cardon. Because removal is the remedy sought by Plaintiffs in Count 16, rather than liability, Plaintiffs are entitled to summary judgment on Count 16 in the form of an order removing Defendant Wil Cardon as Trustee of the 2003 Family Trust.

For the foregoing reasons,

IT IS ORDERED granting Plaintiffs' Motion for Partial Summary Judgment (Counts 13-16) in the following respects:

1. As to Count 14, Defendant Leo R. Beus is hereby removed as Power Holder of the Wilford A. and Phyllis R. Cardon Irrevocable Life Insurance Trust dated October 3, 1997;

2. As to Count 15, it is declared that on June 10, 2014, Defendant Wil R. Cardon was lawfully removed as Manager of Boa Sorte, LLC.; and

3. As to Count 16, Defendant Wil R. Cardon is hereby removed as Trustee of the 2003 Cardon Family Trust.